JOHN J. DORAN (DEFENDANT)..... APPELLANT;

AND

WALTER L. McKINNON AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

1916
*June 15.
*June 24.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Purchase of Bonds—Statute of Frauds—Memorandum in writing—Correspondence—Relation of documents—Parol evidence.

In an action against D., claiming damages for breach of a contract to purchase bonds, a telegram from D. to his partner was produced saying, "I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms."

Held, that parol evidence was properly received to shew that terms had been stated by D., over his signature, that they were the only terms and were those referred to in the telegram and the two constituted a sufficient memorandum within the Statute of Frauds. *Ridgeway* v. *Wharton* (6 H.L. Cas. 238) and *Baumann* v. *James* (3 Ch. App. 508) followed. Duff J. dissented.

Judgment of the Appellate Division (35 Ont. L.R. 349) affirming that at the trial (34 Ont. L.R. 403) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming, by an equal division of opinion, the judgment at the trial(2) in favour of the plaintiff.

The only material question raised on this appeal was that relating to the Statute of Frauds under the circumstances stated in the above head-note. The defendant pleaded two other matters of defence—first, that he was only acting as plaintiff's agent for sale of the bonds.

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 35 Ont. L.R. 349.

(2) 34 Ont. L.R. 403.

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The courts below held, on the evidence, that he was a purchaser, and that finding was accepted on this appeal. The second defence was that plaintiffs had been guilty of misrepresentation by stating that the bonds had not been offered for sale in New York, whereas they had been so offered and refused. That defence was disposed of on the ground that defendant, after becoming aware of the misrepresentation, did not repudiate his contract to purchase, but elected to adhere to it.

Rowell K.C. and *J. E. Lawson*, for the appellant, relied on *Taylor* v. *Smith*(1).

J. B. Clarke K.C., for the respondents, cited *Ridgway* v. *Wharton*(2); *Baumann* v. *James*(3); and *Cave* v. *Hastings*(4).

DAVIES J.—I have had no difficulty in agreeing with the finding of fact of the trial judge, approved of by the Appellate Division, that the appellant defendant is liable on his contract to purchase the Alberta bonds (so-called) in dispute.

I am also satisfied that, whether or not the alleged misrepresentation on the seller's part as to the bonds not having before been offered for sale in New York, was such a misrepresentation as would have availed defendant to repudiate his contract, had he elected to do so in proper time, he, with full knowledge of the facts, elected not to repudiate, but to approbate. He cannot now be heard at this stage of the game to change his mind, more especially as the point was not pressed at the

(1) [1893] 2 Q.B. 65; Halsbury, Laws of England, vol. 7, p. 370, sec. 762.
(2) 6 H.L. Cas. 238.
(3) 3 Ch. App. 508.
(4) 7 Q.B.D. 125.

trial, where it should have been fought out had the defendant desired to take advantage of it.

I have had, however, great difficulty in reaching a conclusion, the contract being one within the Statute of Frauds, whether there is sufficient written evidence to satisfy that statute.

Apart from authority, I should have been inclined to think the evidence insufficient, and, although a careful reading of the many authorities *pro* and *con* has not entirely removed my doubts, I think the weight of the authority is to the effect that parol evidence may be given to connect two documents together which do not expressly refer to each other, but which connection and reference is a matter of fair and reasonable inference.

In this way the two documents may make a contract within the statute. Such evidence may not be resorted to for the purpose of shewing what the terms of the contract are, but only in order to shew what the writing is which is referred to.

In *Ridgway* v. *Wharton*(1) Lord Cranworth, when sitting alone as Lord Chancellor and over-ruling the decision of the Vice-Chancellor, is reported as saying:—

> Even though the terms had in fact been previously reduced into writing, the statute is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it *contained in the signed paper*.

Afterwards, when the case came before the House of Lords on appeal, he, after two arguments, changed his mind on the point of the admissibility of parol evidence to identify the writing or document to be read into or connected with the one signed by the party sought to be charged, and is reported in 6 House of

(1) 3 DeG. M. & G. 677, at p. 693.

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Lords Cases, at page 257, as saying, after referring to his change of opinion:—

> The authorities lead to this conclusion that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, *parol evidence may be admitted to shew what that writing is*, so that the two, taken together, may constitute a binding agreement within the Statute of Frauds.

In that case "instructions" were referred to which might have been either by parol or in writing, but it was held that it might be shewn by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document which had been produced.

The case of *Ridgway* v. *Wharton*(1) was followed by *Baumann* v. *James*(2), an action brought by a tenant against his landlord for specific performance of an agreement to grant a lease. The landlord had written a letter promising the tenant a lease for fourteen years "*at the rent and terms agreed upon*," to which the tenant wrote back an unqualified acceptance.

The Court of Appeal held, on the authority of *Ridgeway* v. *Wharton*(1) and other cases, that parol evidence was admissible to connect a report, made by a surveyor, previously recommending the granting a lease for fourteen years at a given rent, and that it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the Statute of Frauds.

The cases of *Taylor* v. *Smith*(3), *Potter* v. *Peters*(4), and others upon which Mr. Rowell naturally relied to

(1) 3 DeG. M. & G. 677 at p. 693; 6 H.L. Cas. 238, at p. 257.
(2) 3 Ch. App. 508.
(3) [1893] 2 Q.B. 65.
(4) 72 L.T. 624.

support his contention are difficult to reconcile with the decisions above referred to, but the case of *Long* v. *Millar*(1) is in line with them. In the latter case the purchaser signed a memorandum to purchase three lots of land, 40 feet frontage on Pickford Street, Hammersmith, for £310, and agreed to pay deposit in part payment of £31 and pay the balance and complete on the 1st October. The vendor (defendant) signed a receipt for the £31

deposit on the purchase of three plots of land, Hammersmith.

Both documents were signed at the same time, and the Court held that they could be connected by parol evidence, and that, together, they formed a sufficient contract to satisfy the Statute of Frauds. In that case, Bramwell L.J. said (p. 454):—

I think that, subject to the point which has been raised as to the omission of the vendor's name from the agreement signed by the plaintiff and the receipt, there is a sufficient memorandum, and it appears to me that *Ridgway* v. *Wharton* (2) and *Baumann* v. *James*(3) are in point, and are decisive.

Bagallay L.J. says (p. 455):—

The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence.

And Thesiger L.J., at p. 456, says:—

If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgeway* v. *Wharton*(2); there "instructions" were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to shew that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified.

(1) 4 C.P.D. 450.
(2) 3 De G.M. & G. at p. 693; 6 H.L. Cas. at p. 257.
(3) 3 Ch. App. 508.

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And in *Wylson* v. *Dunn*(1), Kekewich J., in 1887, at p. 575, says:—

> Therefore the reference may be a matter of fair and reasonable inference, * * * but there need not be an express reference from one letter to the other.

The learned writer of the article on "Contract," in Art. 761, in the 7th volume of Halsbury's Laws of England, has collected all the authorities on both sides of the question in a note to that article, page 369 of that volume. His own opinion of the result of the authorities is summed up in Art. 761, as follows:—

> 761. When one document refers to another, the two may be read together so as to constitute a complete memorandum.
>
> The same rule applies if the documents can be connected together by reasonable inference, although there is no express reference from one document to the other.

Now, in the case before us we have the defendant's telegram of the 3rd June to his associate in New York, Daude, as follows:—

> E. Daude,
> Hotel Martinique, June 3rd, 1914.
> New York, N.Y.
>
> The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.
>
> (Sgd.) J. J. DORAN.
>
> Rush charge.

The question is, can the identity of the bonds and the meaning of the words, "our terms," be fixed by prior letters or documents signed by the defendant? I am of the opinion that, under the authorities, they can, and that parol evidence was properly received to prove the existence and identity of the documents shewing what these terms were, and that they had been stated by defendant over his own signature, and

(1) 34 Ch. D. 569.

that there were no other terms than those stated and to which the telegram applied.

Once the principle I have accepted is applied to the facts of the case, no room for doubt can exist as to the identity of the Alberta bonds or the meaning of the words "our terms," or as to the statute having been complied with.

The appeal, therefore, fails and must be dismissed with costs.

IDINGTON J.—The telegram of 3rd June, 1914, from appellant to his friend and agent, Daude, as follows:—

E. Daude,
Hotel Martinique, June 3rd, 1914.
New York, N.Y.

The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.

(Sgd.) J. J. DORAN.

Rush charge.

seems to dispose of the appellant's pretension that he was only an agent of respondents, and opens the way to find in the rest of the correspondence evidence to satisfy the Statute of Frauds, assuming the contract falls within the requirements of that statute.

I think that with no other oral evidence than such as permitted in such cases to enable one to understand what the parties were about, there is enough in the correspondence to demonstrate therefrom a contract evidenced in writing to comply with the statute.

As to the alleged misrepresentation, I do not think even if a possible defence that the appellant can maintain it in face of the fact that after full knowledge of its alleged effect he continued instead of repudiating to act as he did.

I think the damages are more questionable, but I

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am unable to say, as matter of law, that the loss to respondents was less than the learned trial judge has assessed.

The appeal should be dismissed with costs.

DUFF J. (dissenting)—I would allow this appeal.

ANGLIN J.—In view of the explicit finding of the learned trial judge that the plaintiffs and their witnesses are to be credited rather than the defendant and his witness Daude, it is quite impossible to reverse the holding, concurred in by all the appellate judges, that the defendant contracted to purchase the bonds in question as a principal.

I am also satisfied, for the reasons assigned by Mr. Justice Riddell, that if there was misrepresentation as to prior negotiations in New York in regard to these bonds, the defendant, with full knowledge, elected not to exercise any right to rescind to which such misrepresentation might have given rise. The evidence shews that he knew of the prior attempted sale to Harris, Forbes & Co. (of which he complains) before the 17th June. He did not then repudiate the purchase. On the contrary, in answer to a telegram of the plaintiffs of the 26th June,

> When will you take delivery Albertas? Expect hear from you twenty-fourth.

Doran wired on the 28th:—

> Delay greatly your fault. Doing best settle matter fast as possible. Impossible settle by twenty-fourth. Will close deal as soon as possible. Expect have situation settled by Friday. Claftin's failure hurt market. Money situation very bad. If necessary hold bonds subject to prior sale by you.

Subsequent letters and telegrams from the defendant and Daude put in evidence shew that they con-

sidered the contract with the plaintiffs in existence at least down to the 25th July. The first suggestion of repudiation comes from Daude on the 13th August, after the plaintiffs had sent further communications pressing for payment.

The only question requiring further consideration is the defence raised by the fourth section of the Statute of Frauds, which admittedly applies to the transaction. *Driver* v. *Broad*(1).

On the 3rd of June the defendant telegraphed to his representative, or partner, Daude:—

> The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.

This telegram puts beyond controversy the fact that the defendant purchased the Alberta bonds. It is conceded that the identity of these bonds has been fully established by prior letters signed by the defendant, which also state the names of the vendors, the price, and an arrangement as to commission and place of payment and delivery. The only objection taken to the sufficiency of the telegram of the 3rd June as a memorandum to satisfy the Statute of Frauds is that the phrase, "our terms," might refer to some terms arranged over the telephone on the previous day other than and in addition to those set forth in the plaintiffs' original circular offering the bonds for sale, which admittedly formed the basis of negotiations, and is referred to as such in Doran's letter to Daude of May 26th, repeating some of the particulars, and the subsequent correspondence. A slight reduction of the quantity of the bonds as stated in Doran's letter of the 26th, the plaintiffs' assent to the commission for which the defendant stipulated, and the place of pay-

(1) [1893] 1 Q.B. 539, 744.

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ment and delivery are set forth in a telegram from Doran to Daude of the 29th May. There is no suggestion in the evidence that there were any other "terms" of the sale. The phrase, "our terms," in the telegram of June 3rd, is certainly ambiguous, but, upon the authority of such cases as *Baumann* v. *James*(1), *Cave* v. *Hastings*(2), and *Ridgway* v. *Wharton*(3), I have no doubt that parol evidence was properly received to shew that terms had been stated by the defendant in writing over his own signature, that there had been no other terms than those so stated, and that it was to the terms so stated that the telegram referred. That evidence has been given and is conclusive.

On the 16th of June the defendant wired to Doran as follows:—

> Alberta Bonds must be paid for to-day. McKinnon's statement shews them worth $227,085.98, less our commission, $2,500.00, or $224,585.98 to them. Answer at once.

This telegram clearly refers to and implies a recognition of a statement of McKinnon & Co. Such a statement had been sent to the defendant on the previous day, accompanied by an intimation that the plaintiffs were ready to make delivery, and understood that the defendants would take it on the following day. The statement was in the form of an account, and gave full particulars of the purchase. On the authorities above cited, to which may be added *Long* v. *Millar*(4), I have no doubt that the statement referred to in Doran's telegram to Daude may be identified by parol evidence. I think that Doran's telegram of the 16th, with McKinnon's statement of the 15th, contains a sufficient memorandum to meet the require-

(1) 3 Ch. App. 508.
(2) 7 Q.B.D. 125.
(3) 6 H.L. Cas. 238.
(4) 4 C.P.D. 450.

ments of the statute. It, at all events, supplies any possible deficiency in the earlier documents.

No ground has been shewn for a reduction in the damages awarded. The plaintiffs disposed of the bonds with reasonable promptitude, and they made every reasonable effort to obtain the highest possible price for them in order to protect themselves as well as the defendant. There is no evidence that they did not get the full market value or as high a price as could be obtained at any time after the defendant had repudiated his contract.

I would dismiss the appeal with costs.

BRODEUR J.—It was contended by the appellant that his relations with the respondents were those of principal and agent. But I am unable to concur in such a contention.

The plaintiffs (respondents) are bond investment brokers. They were the owners of $230,000 railway bonds, guaranteed by the Alberta Government, and having seen in the newspapers that Mr. Doran, the defendant (appellant), had tendered for $1,000,000 bonds issued by the city of Toronto, approached him with the view of selling to him their bonds.

They gave him the price at which they would dispose of those bonds and they told him the allowance or bonus they would give him.

The defendant tried to sell those bonds, and he evidently got a better price than the one stipulated for by the respondents, and, without disclosing the name of his alleged principal, he negotiated with the respondents for an outright purchase of the bonds.

On the 3rd of June, 1914, he telegraphed to Mr. Daude, his friend or partner in New York, that he had absolutely bought the bonds.

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With such an admission, it is impossible now for the appellant to say that he acted as agent of the respondents. It is pretty evident that he became the purchaser of those bonds.

He was then relying on some negotiations which were being carried on in New York by Mr. Daude for the resale of those bonds. But, unfortunately, those New York negotiations failed, and the European war, which, a few weeks after, was declared, rendered ineffective all efforts he made to dispose of the bonds. Now that he is sued in damages for breach of contract, he claims that there was no memorandum in writing signed by him sufficient to satisfy the Statute of Frauds.

It becomes necessary, in order to discuss properly that defence, to go fully into the documents, letters and correspondence filed in the case.

At first there was a general circular issued by the respondents, giving the quantity of bonds to be sold, their price and conditions generally.

That circular was formally handed to Mr. Doran on the 26th of May, and he was told that the bonds would be sold to him at the price stated in the circular, less one-half of one per cent. That reduction in the price represented a sum of $1,150.

On the same day he writes to his associate or friend, Mr. Daude, apprising him of the offer, and asking him to wire him if he could handle those bonds. On the 29th of May he wired to Daude that McKinnon would sell the bonds "less $2,500 to us subject to Toronto payment and delivery." On the 30th he wires again: "McKinnon wants confirmation *re* Alberta Bonds. Answer."

On the 2nd of June the respondents write a letter in the following terms:—

J. J. Doran, Esq., June 2, 1914.
Crown Office Bldg.,
Toronto, Ont.

Dear Sir,—Following your telephone conversation with our Mr. McKinnon, we take pleasure in confirming to you the sale of $223,700 Province of Alberta (Guaranteed) Bonds, bearing 5%, payable semi-annually, maturing Oct. 22nd, 1943. The price is a rate to yield you 4.95% less an allowance to you of $2,500.00.

The legal opinion of J. B. Clarke, K.C., has already been obtained, however, the legal files are not yet completed. Mr. Clarke is at present out of town, and upon his return, which is expected in a few days, we will take the necessary steps to have the legal papers completed and forwarded to you in order that your solicitor may approve legality.

Assuring you of our appreciation of this our first transaction with you, we are,

Yours very truly,
W. L. McKINNON & Co.

On the 3rd of June Doran sends the following telegram to Daude:—

E. Daude,
Hotel Martinique, June 3rd, 1914.
New York, N.Y.

The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.

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On the 5th of June the respondents sent to the appellant the complete legal file mentioned in their previous letter of the 2nd of June.

He had them examined by his solicitor, Mr. Fullerton, as appears by the letter of the latter of the 9th of June.

On the 15th of June the respondents sent a statement, figured as at the 16th June, shewing as at that date the amount to be paid $224,585.98, and closed their letter by saying:—

As we understand that funds are now being transferred here from New York, and that you wish to take delivery to-morrow, we shall try to get in touch with you by telephone in the morning in order to ascertain an hour for delivery to suit your convenience.

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On the 16th of June Doran sent the following telegram to Daude:—

H. Daude,
Hotel Martinique,
New York, N.Y.

Alberta Bonds must be paid for to-day. McKinnon statement shews them worth $227,085.98, less our commission, $2,500.00, or $224,585.98 to them. Answer at once.

(Sgd.) J. J. DORAN.

Rush charge.

It is established by the oral evidence given that all those documents have reference to the alleged sale of those Alberta bonds. Those letters and documents, according to my opinion, constitute a memorandum sufficient to satisfy the Statute of Frauds.

The correspondence between Doran and Daude is admissible as evidence of the contract of sale. Any note or letter written by a purchaser to a third person containing directions to carry the agreement into execution may be a sufficient memorandum to meet the requirements of the statute. *Seagood* v. *Meale*(1) in 1721; *Welford* v. *Beazely*(2) in 1747; *Gibson* v. *Holland*(3) in 1865; Sugden, Law of Vendors and Purchasers, 14th ed., p. 139; Agnew, Statute of Frauds, p. 244.

We have in the present case the circular containing the offer of sale of those bonds. We have also the letter of Doran to Daude of the 26th of May, stating all the conditions at which sale could be made. It is pretty evident, however, that the allowance of $1,150 was not considered attractive enough. They asked a sum of $2,500. The matter of that further reduction was discussed by Doran and McKinnon, and at last

(1) Prec. Ch. 561. (2) 3 Atk. 503.
(3) L.R. 1 C.P. 1.

the latter yielded, since, on the 3rd of June, Doran informs his agent or associate, Daude, that McKinnon agreed "to our terms." We see also that that telegram was sent the day after McKinnon wrote a lengthy letter giving all the conditions of the sale. Later on, in the middle of June, Doran is seen urging upon his New York friend to close and send the money.

There is no doubt that McKinnon's letter of the 2nd of June was binding on them; then the subsequent note in writing, signed by Doran, is sufficient to bind them. Parol evidence could be adduced to show that those documents referred the one to the other, and that the contract described by McKinnon is the same as the one accepted by Doran.

It is a pretty well-settled rule that when one document refers to another, the two may be read together so as to constitute a complete memorandum. The same rule applies if the documents can be connected together by reasonable inference, although there is no express reference from one document to the other. Halsbury, vol. 7, No. 761.

On that question of reference I will quote also the following decisions in support of the respondents' contentions: *Dobell* v. *Hutchinson*(1) in 1835; *Ridgway* v. *Wharton*(2) in 1856; *Baumann* v. *James*(3) in 1868; *Long* v. *Millar*(4) in 1879; *Cave* v. *Hastings*, 1881(5). In so far as I have been able to find, these decisions have never been overruled, and are accepted as the settled law of the land. The appellant relied mostly on: *Pierce* v. *Corf*(6) in 1874; *Taylor* v. *Smith*(7) in 1892; *Potter* v. *Peters*(8) in 1895.

(1) 3 A. & E. 355.
(2) 6 H.L. Cas. 238.
(3) 3 Ch. App. 508.
(4) 4 C.P.D. 450.
(5) 7 Q.B.D. 125.
(6) 29 L.T. 919.
(7) [1893] 2 Q.B. 65.
(8) 72 L.T. 624.

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In those three cases the documents contain no reference to one another, and could not be connected by reasonable inference from the circumstances of the case. They have never been considered, however, as overruling the decision rendered by the House of Lords in the case of *Ridgway* v. *Wharton*(1).

The case of *Potter* v. *Peters*(2) was decided by His Lordship Mr. Justice Kekewich, in 1895, the same judge who, in 1887, rendered judgment in the case of *Wylson* v. *Dunn*(3), where a letter, not referring expressly to a former one, contained the declaration that he was willing to take half an acre of the land "as agreed upon," was held, however, as containing a sufficient reference to form a valid contract within the Statute of Frauds.

In *Taylor* v. *Smith*(4) an invoice of the goods was sent by the plaintiffs to the defendant, and the carrier also sent an advice note to inform him of the arrival of the goods. That advice note specified the quantity of goods, but did not state their price nor refer to the invoice or any other document. The defendant, after inspection, wrote on the advice note: "Rejected; not according to representation." It was held that there was not a sufficient note of the bargain as required by the Statute of Frauds.

No reference was made by the judges who decided *Taylor* v. *Smith*(4) to *Ridgway* v. *Wharton*(1). One of the judges has referred, however, to the case of *Long* v. *Millar*(5), which I have quoted above, and said the case of *Taylor* v. *Smith*(4) wanted the main

(1) 6 H.L. Cas. 238.
(2) 72 L.T. 624.
(3) 34 Ch. D. 569.
(4) [1893] 2 Q.B. 65.
(5) 4 C.P.D. 450.

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element to be found in the *Millar Case*(1), viz., the existence in a document signed by the defendant of words referring to a contract of purchase.

I have, then, come to the conclusion that the appellant, in the present case, fails, and that his appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *James S. Fullerton.*

Solicitors for the respondents: *Clarke & Swabey.*

(1) 4 C.P.D. 450.